Filed 5/13/08 P. v. Jenkins CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMAL ALBERT JENKINS, Defendant and Appellant.	C051852 (Super. Ct. No. 04F00799)

Defendant Jamal Albert Jenkins was charged with oral copulation with a minor (count 1; Pen. Code, § 288a, subd. (b)(1); undesignated section references are to the Penal Code); penetrating a minor with a foreign object (count 2; § 289, subd. (h)); engaging in sexual intercourse with a minor (counts 3-5; § 261.5, subd. (c)); and sodomy with a minor (count 6; § 286, subd. (b)(1)).[1] It was also alleged that he had suffered two prior "strikes" (§§ 667, subds. (b)-(i), 1170.12). Before jury

[1] Although counts 3 through 5 were pled generically, the prosecutor explained to the jury that each count was based on a different alleged act, depending on the positions of the participants.

trial began, the trial court granted defendant's motion to bifurcate trial of the priors. The People thereafter moved to dismiss count 6 due to insufficient evidence.

The jury hung on count 2, as to which the trial court declared a mistrial, but convicted defendant on counts 1, 3, 4, and 5. The court then found the alleged priors true.

Declining defendant's request to strike one or both strikes (§ 1385; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*)), the trial court sentenced defendant to 25 years to life in state prison on count 1, with the same term run concurrent on counts 3 through 5.

Defendant contends:

1. The trial court erred by admitting into evidence Detective Linke's videotaped interview of the victim, who did not testify at trial, under the hearsay exception for the declarant's state of mind (Evid. Code, § 1250). Furthermore, defendant's trial counsel was ineffective in failing to object to the videotape's admission.

2. The trial court erred by admitting Deputy Warren's testimony about the victim's unrecorded statement immediately after the incident, and the victim's preliminary hearing testimony about that statement. First, this evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution (cf. *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*)) and Evidence Code section 1291, and defendant's trial counsel was ineffective in failing to

object on these grounds. Second, because the victim's statement was coerced, its admission over objection on that ground violated defendant's due process rights.

3. The trial court erred by denying defendant's *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)

4. The trial court abused its discretion by refusing to strike defendant's strikes.

5. The sentencing minute order requires correction.

We shall remand the matter to the trial court with directions to correct the sentencing minute order. In all other respects, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The alleged crimes

On January 24, 2004, in a "greenbelt" in a residential area of Citrus Heights, defendant, aged 40, and E.C., a female aged 16, had sex for about two hours in full view of the neighbors.

P.T., who lived across from the greenbelt, heard a man's distinctive laugh.[2] She recognized it from two months before, when she had seen the man, who was African-American, and a younger white female embracing and talking in the greenbelt for about an hour.

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[2] P.T. believed that she heard the laughter on January 24, 2004, around 9:00 in the morning. However, the other eyewitness and police testimony established that it could not have been so early.

P.T. walked to the home of her neighbors, J. and M. G., and announced: "They're out there again." The G.s directed P.T. to their front window, where she saw that the male, naked and kneeling over the female, was moving his buttocks up and down, apparently engaged in sexual intercourse.

After driving to the store, P.T. and J.G. returned to find the activity still going on. Looking out again from inside the G. house, they saw the male performing oral sex on the female. J.G. called the police.[3]

J.G. recalled events generally the same way, though differing as to when they began and in which order they occurred. M.G. recalled that beginning around 2:30 or 3:00 p.m., the male performed oral sex on the female for 15 or 20 minutes; he then got on top of her and engaged her in intercourse; they then switched positions and continued the intercourse.

D.B., another resident of the same street, also observed the couple at different times and eventually called the police.[4] When he called, the couple were having intercourse with the female atop the male.

Sacramento County Sheriff's Deputies Marc Warren and Mike Paredes, assigned to the Citrus Heights Police Department,

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[3] The tape of her 911 call was played for the jury and a transcript provided.

[4] The tape of this 911 call was also played for the jury, with a transcript provided.

arrived in response to the 911 calls at around 4:45 p.m. Warren saw defendant kneeling, with his back to the officers, and "a white female subject on her hands and knees directly in front of him"; defendant was "making a thrusting motion like he was having sex." On the ground were six empty beer cans and a sleeping bag.

As the officers neared, defendant and E.C. stopped what they were doing. Defendant stood up and put on his sweat pants, through which his erection could be seen. E.C. put on her shirt, but not her panties.

E.C.'s statement to Deputy Warren

E.C. told Deputy Warren that she was 18 years old and was born in November 1984; he realized, however, that that birth date would make her 19. After Warren moved her away from defendant, she admitted that her true birth year was 1987 and her true age was 16. Deputy Paredes took defendant into custody, while Warren handcuffed E.C., put her in the back of his patrol car, and took her to the police station for questioning.[5]

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[5] As we explain in more detail in part II of the Discussion, Warren considered this an investigative detention, not an arrest.

At the station, Warren unhandcuffed and interviewed E.C.[6] According to Warren, she was "calm" and "forthcoming," not nervous or uncomfortable. Two or three times, before the interview started and again toward the end, she asked to go to the bathroom, but he would not allow it; he finally told her that it was not possible because she would have to undergo an evidentiary examination after the interview. She never said that her need was so urgent she could not continue the interview.

E.C. said that she and defendant met a couple of months before, exchanged phone numbers and stayed in touch. (E.C.'s mother also knew defendant, but E.C. did not know how.) E.C. had told him before January 24, 2004, that she was only 16 and "was having issues as far as whether they should remain in contact with each other due to the differences in their age." She feared that defendant might get into trouble on this account. She had lied about her age to Warren because she also

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[6] The interview was not recorded. When they arrived, the station's regular interview rooms were in use; therefore, Warren conducted the interview in the evidence room, which was not equipped for recording, and he did not have a tape recorder.

Because E.C. did not testify at trial, the jury heard about the substance of the interview from Warren's testimony and from E.C.'s testimony about the statement at defendant's preliminary hearing. As the trial court and the parties noted for the record, Warren was allowed to give his testimony to impeach E.C.'s recantation at the preliminary hearing, even though that recantation had not yet been presented to the jury.

feared getting into trouble. She and defendant had never had sex before.

On January 24, 2004, E.C. told her father, with whom she was staying, that she was going to a friend's house. Instead, by prearrangement, she met defendant at the greenbelt. He brought a sleeping bag and a six-pack of beer. She drank one beer; defendant had the rest. She did not appear inebriated to Warren.

As E.C. and defendant sat talking and drinking beer, they began "playing around." After playfully touching defendant, she took off her pants and underwear and lay down. He began licking her vagina, then inserted his fingers into it. He continued these acts for 45 minutes.

After that, she and defendant had sex in the missionary position, with defendant on top. Then they switched positions and continued the intercourse. From there, they moved on to "the doggy style position." The officers arrived soon after.

E.C.'s later statements and conduct

The evidentiary examination

Deputy Paredes took E.C. to UC-Davis Medical Center for the evidentiary examination.[7] However, she refused to permit it.

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[7] According to Deputy Warren's subsequent report, he learned from Deputy Paredes that E.C. had volunteered to Paredes that defendant had also sodomized her. However, because Paredes, the only witness to that allegation, was unavailable to testify at trial, the People moved to dismiss count 6, alleging sodomy, for insufficient evidence. The trial court granted the motion.

The Linke interview

In March 2004, Detective John Linke conducted a videotaped interview of E.C., which was played for the jury with a transcript. E.C. asked: "Is this something I have to do?" Told that she did not, she said: "Okay, well, I'm not trying to not do it [*sic*] because I [*sic*] just sick of talking about it." She said over and over that she did not want to talk about the case, sometimes adding that she was sick of doing so or that it was stressful.[8] Linke finally gave up and ended the interview.

The preliminary hearing

At the preliminary hearing in April 2004, E.C. testified in part: Before January 24, she had told defendant that she was 18, not 16; she did not remember telling Deputy Warren otherwise. On January 24, although she drank three beers (not one) with defendant, they did nothing but kiss.[9] She had falsely told Warren a different story because "when they were questioning me I -- I was really scared, and I wasn't really paying attention to what they were saying. I just kept thinking about other things like what my parents were going to say if

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[8] She answered one question substantively. When Detective Linke said that other officers had told him she refused the evidentiary examination because she had not wanted to get defendant in trouble, she denied it: "I didn't say that. I said no, because I was afraid. I didn't know what they were gonna do and I just didn't want --"

[9] She admitted, however, that while they were kissing she removed her pants and underwear before going to look for a bathroom.

they -- if I got in trouble. I wasn't -- when they asked me things I was just trying to answer it fast so I didn't have to sit there. Um, I was just -- I was just answering yes or no, I didn't -- I wasn't really paying attention to what I was saying."[10]

Trial

Before trial, E.C. indicated that she would refuse to testify. Appearing in court and advised by counsel, she did not change her mind even after granted immunity and threatened with contempt. The trial court found her unavailable. Pursuant to the parties' stipulation, a redacted version of her preliminary hearing testimony was read into the record after Deputy Warren had testified about her statement to him.

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[10] Deputy Warren testified that he did not do a "yes or no type interview" of E.C.

At the close of the hearing, the presiding magistrate made extensive and negative findings about E.C.'s credibility. The magistrate observed: (1) E.C.'s story was impeached by her prior inconsistent statement to Deputy Warren. (2) Her claim that only kissing took place was inconsistent with the length of time the events lasted. (3) She admitted taking off her underwear and pants; she claimed that it was done before she went off to urinate, but gave no reasonable explanation of why she would have needed to remove her clothes for that purpose. (4) Since her original interview with Warren, she had consistently refused to speak to anyone investigating the case. (5) Her claim that she simply answered questions yes or no was inconsistent with Warren's detailed and credible accounts of her statements. (6) She had contradicted herself as to how many times she had seen defendant before January 24, 2004. These findings were not in evidence at trial.

Other evidence

E.C.'s mother testified that she had told defendant (whom she knew before E.C. did) that E.C. was 16.[11]

Defense case

Defendant did not testify. He called only one witness, his investigator.

DISCUSSION

I

Though E.C.'s interview with Detective Linke did not directly inculpate defendant, he contends that its admission was prejudicial error. According to defendant, it was hearsay not within the exception cited by the People, and it prejudiced him because Linke harshly condemned defendant's alleged conduct. Defendant also claims that his trial counsel was ineffective in failing to object to this evidence.

Background

The People moved in limine to admit the videotape under the hearsay exception for a declarant's state of mind (Evid. Code,

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[11] Remarkably, though this testimony supported the People's case on the main disputed issue, the prosecutor asked the jury to disregard it, calling the mother "a train wreck of a human being" whose "value as a witness . . . in this matter is little, if any." The prosecutor may have concluded that the mother's demeanor (she admitted being "upset," and defense counsel asked if she had taken drugs) would cause the jury to distrust her testimony in any event.

§ 1250),[12] arguing that "it tended to explain [E.C.'s] state of mind after January 24, 2004 to the present": it showed a step on the road from E.C.'s original candor with Deputy Warren to her ultimate recantation. Equipped with this evidence, the jury could better judge which of her stories was more credible.

The trial court granted the unopposed motion. While Detective Linke was on the stand, the videotape and its transcript came into evidence, and Linke testified about them at length.

Analysis

Defendant contends that the interview was inadmissible under Evidence Code section 1250 because E.C.'s state of mind was not relevant to any issue in the case. Anticipating the People's response that the contention is forfeited because

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[12] Evidence Code section 1250 provides:

"(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

"(2) The evidence is offered to prove or explain acts or conduct of the declarant.

"(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

defendant did not object to the admission of the evidence, he accuses his trial counsel of ineffective assistance.

Because defendant made no objection to the Linke interview, the claim of error has been forfeited on appeal. (Evid. Code, § 353, subd. (a); *People v. Mitcham* (1992) 1 Cal.4th 1027, 1065.)

Assuming for the sake of argument it was error to admit the Linke interview, defendant has not made out a case of ineffective assistance of counsel for failure to object.

In order to make out a case of ineffective assistance of counsel, a defendant must show, among other things, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*In re Avena* (1996) 12 Cal.4th 694, 721.) Defendant cannot make that showing.

The victim, E.C. refused to answer any substantive questions during the Linke interview. Although Officer Linke make critical remarks about E.C. during the interview, a jury would understand that these remarks were not evidence and merely reflected the frustration of a police officer who was unable to get a statement from the victim. Defendant was observed engaging in sexual conduct with the victim by four independent citizen witnesses. It was undisputed that the victim was, in fact, 16 years old at the time of the sexual conduct at issue. Considering all these circumstances, it is not reasonably

probable that defendant would have obtained a better result had the Linke interview been excluded from evidence. There was no ineffective assistance of counsel.

II

Defendant contends that Deputy Warren's testimony about E.C.'s statement to him was improperly admitted for two reasons: the statement's use violated the Confrontation Clause, and the statement was obtained by coercion. He also contends that E.C.'s preliminary hearing testimony was improperly admitted in violation of Evidence Code section 1291. Because trial counsel objected to the statement's admission only on the ground of coercion, defendant also calls counsel ineffective for not raising the other grounds. Finally, he contends that the improperly admitted evidence prejudiced him.

We reject these contentions. A confrontation clause objection to E.C.'s statement would have failed because defendant had the opportunity to cross-examine E.C. at the preliminary hearing, and an objection under Evidence Code section 1291 to E.C.'s preliminary hearing testimony would have failed for the same reason. Finally, the trial court's finding that Warren did not coerce E.C.'s statement was correct. Because that evidence was properly admitted and critical to the key issue in the case, its admission did not unfairly prejudice defendant.

Background

The defense motion to suppress the statement

Defense counsel moved in limine to suppress E.C.'s statement on the ground that it had been obtained by coercion. The motion did not state any supporting facts.

After finding E.C. unavailable as a witness, the trial court turned to this motion. Noting that this issue was separate from that of E.C.'s preliminary hearing testimony, the court said: "And let's make it clear for the record the People would envision reading in the preliminary hearing transcript of E[.]C[.]'s statement as prior testimony given under oath. There's no Crawford issue with that. And that statement having come in, then you [the prosecutor] would be using the statement she gave to officers on the night as a prior inconsistent statement to impeach her testimony at the preliminary hearing, correct?" The prosecutor agreed in part, pointing out that at the preliminary hearing E.C. had admitted making some statements in the police report but denied making others. The parties and the court agreed that Deputy Warren would probably have to testify on this subject in an Evidence Code section 402 hearing.

Deputy Warren's testimony

At the Evidence Code section 402 hearing, Deputy Warren testified:

He did not arrest E.C. on January 24, 2004, but only detained her. He originally moved her away from defendant

because she had apparently given him a false age or birth date. After she told him that she was really 16, his records check showed that she was not a missing person but did not establish her age.

Deputy Warren handcuffed E.C. and placed her in the back seat of his patrol car before driving to the police station, "a more secured environment." He handcuffed her because it was his standard procedure to do so before putting people in his patrol car. He had already pat-searched her for weapons and found none.

Deputy Warren told E.C. where he was taking her, but not why, and she did not ask. She seemed a little nervous, but did not cry. She did not try to talk to him.

At the station, he escorted her back to the interview rooms, but they were in use. Therefore, he took her to the only available room, the property evidence room, which was about 25 or 30 feet on a side. Before she sat down, he uncuffed her. The door was open during the interview.

E.C. did not ask to leave, and he did not tell her that she could. He did not tell her that she did not have to talk to him or that she could call someone, nor did she ask to do so. He did not ask her if she wanted her parents to be present. He did not Mirandize her or inform her of her rights pursuant to Welfare and Institutions Code section 625. In his view, she was not in custody or a crime suspect; she was a detainee or

possible victim, and juvenile detainees are not free to leave while the police are investigating a potential crime.

E.C. told Deputy Warren that she had drunk one beer. He did not independently determine whether she was under the influence of alcohol because she did not look or sound inebriated.

Deputy Warren asked E.C. open-ended questions; he did not recall if he also asked yes-or-no questions. He spoke in a soft tone of voice. He did not make any threats or promises.

When he began to question her, she calmly started telling him what had happened. She said that she was scared when she gave him a false age; she did not want to get in trouble. She did not say that she was still scared. She did not seem disoriented. Her initial apparent fear went away as she spoke. She was friendly and forthcoming.

E.C. asked to use the restroom more than once, but he did not allow it, explaining that it would interfere with the evidentiary examination. This is standard department policy when dealing with sexual assault victims. She seemed satisfied with his explanation. She did not say that she would refuse the evidentiary examination. He did not notice any urgency on her part to use the bathroom.

After concluding the interview, which lasted about 15 to 20 minutes, Deputy Warren went over his notes with her; she said that everything she had told him was true. He then arranged for

her to be taken to the hospital for the evidentiary examination, telling her that that was what would happen. Deputy Paredes took her there.

Deputy Warren was in full uniform that day, wearing his badge and carrying his firearm. He stood five feet 10 and weighed 210 to 220 pounds.

Argument

Defense counsel argued: Regardless of whether Deputy Warren thought E.C. was under arrest, she testified at the preliminary hearing that she felt she was, either for drinking or for being unclothed in the park, and he treated her as if she was. His claim that she was "amiable and compliant" did not jibe with her demeanor in the courtroom when she refused to testify. It was logical to believe that, in an intimidated and desperate state, she just said or did whatever she thought necessary to get the interview over with -- an inference supported by Deputy Warren's admission that he had refused to let her use the bathroom. When she escaped from Warren, the first thing she said to Deputy Paredes was that she would refuse the evidentiary examination.[13] This proved that she had simply

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[13] The prosecutor disputed this claim. She said that E.C. did not say anything about refusing the examination before reaching the hospital, and refused it then only after asking, "Is this going to get [defendant] in trouble?" and being told "Yes." The prosecutor also stated that before refusing the examination, E.C. had spontaneously augmented her account of the incident, saying to another officer: "Oh, by the way, he also put his

been telling Warren what she thought he wanted to hear so that she could get away as quickly as possible. Although her statement was not beaten or tortured out of her, it was essentially involuntary and coerced: she was involuntarily detained and interviewed, she was never informed of her rights or told that she could leave, there was an "unspoken threat" of arrest, and she was not allowed to use the bathroom.

The trial court replied that E.C. had never asked to leave or refused to talk, the officer had not made any threats or promises, there was no evidence that he overbore her will to pressure her into talking, and whether she lied to get the interview over with went to the evidence's weight, not its admissibility. The court also cited E.C.'s courtroom demeanor: "Threatened with contempt and all the sanctions that go with that, she still fairly freely said she didn't have anything she wanted to say and was quite willing to face the consequences of

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penis in my rectum five times while I was in the . . . doggy style position."

Defendant asserts: "The jury never learned of it, but as counsel *uncontrovertedly* stated, the first thing the minor said when she got out of Warren's car and into his partner's car was that she would not take the medical examination. As counsel noted, this showed how anxious she was to tell Warren what he wanted to hear, and thus to get away from him." (Italics added.) Defendant's appellate counsel apparently overlooked the prosecutor's remarks when preparing his opening brief.

But uncontroverted or not, unsworn assertions by trial counsel are not evidence.

that. So to say that in the context of her interview with Mr. Warren that he somehow imposes such a coercive atmosphere that she is giving involuntary statements that are so unreliable they would . . . deny the defendant due process is inconsistent with what I saw of the same woman yesterday who, sitting just a couple feet away from me looks me in the eye and says, basically, 'I don't care if you hold me in contempt. I'm not going to testify simply because I just don't want to.'"

Defense counsel retorted that, unlike Deputy Warren, the court had informed E.C. of her rights, which there was no reason to think she would otherwise have known at the time of the interview. Furthermore, she had not then had the chance to think things over, as she had had since.

The court's ruling

The trial court ruled:

"I'm going to deny the defense motion. I find the statement is not involuntary within the meaning of the due process rights here. It is probably not voluntary in the lay sense that she would have rather been home watching TV than in the station talking to Officer Warren. But in the context of a due process analysis, I find that there was no coercion, improper or otherwise, that was the motivating cause for her to give the statement.

"Officer Warren's testimony says he made no threats. There were no promises. It was just the two of them in a normal-sized

room. She was not cuffed. The . . . interview was not overly long. She did not ask to leave.

"So I don't think that in assessing the reliability of the statement, the fundamental fairness of introducing the statement, that there is coercion that raises a due process [bar] to introducing the evidence.

"Most of the factors that you have raised, Mr. Miller, I think go to reliability. You may well have a plausible argument that she in part said whatever she thought would get her out of there the quickest just because she would like to go home. But I don't think that means that the statement is coerced or not the product of free will. It's just maybe what she was thinking at the moment. [I t]hink that goes to the weight of the evidence for the trier of fact to determine, not the fundamental fairness to the proceedings of introducing the evidence.

"So for those reasons, I am denying the motion to exclude references to the statement[,] either initially the statement itself or the testimony or cross-examination from the preliminary hearing."

Analysis

Crawford

Defendant asserts that E.C.'s statement was inadmissible under *Crawford, supra*, 541 U.S. 36 [158 L.Ed.2d 177], because it was "testimonial" evidence as defined in *Crawford* and E.C. was unavailable to be cross-examined about it at trial. He further

asserts that trial counsel was ineffective in failing to raise a *Crawford* objection. We disagree on both points.

In *Crawford*, the United States Supreme Court held: "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required [before hearsay may be admitted]: unavailability and a prior opportunity for cross-examination. . . . Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford, supra*, 541 U.S. at p. 68 [158 L.Ed.2d at p. 203].)

E.C.'s statement to Deputy Warren was testimonial hearsay. But the *Crawford* test for admitting such evidence was fully met: E.C. was unavailable at trial, and defendant had the opportunity to cross-examine her at the preliminary hearing. As we now show, defendant took full advantage of that opportunity.

On direct examination at the preliminary hearing, E.C. admitted saying some things in the police report, but denied others. She claimed she did not remember telling Deputy Warren that defendant knew she was 16. She admitted telling Warren that she started flirting with defendant, that she took off her pants and underwear, that she then lay down, that she took off defendant's pants, that she pulled him down on top of her, that she began having sex with him in the missionary position, that they switched positions and continued to have sex, that they

"did it doggy-style," and that defendant sodomized her. She claimed, however, that only the first two statements were true.

On cross-examination, defendant's then counsel[14] asked her about the surrounding circumstances. He elicited from her that she was handcuffed without explanation, which scared her and made her think she was being arrested. He asked whether the police simply told her what they thought had happened and asked her to confirm or deny it; she agreed that "[m]ost of it . . . was like that[.]" He asked whether she felt pressured to answer questions in a certain way and thought she would get done faster if she told them what they wanted to hear; she agreed, saying "[W]hen I would say some things they -- they just kind of looked at me like they didn't believe me, and so I just kind of got scared and said other things." Counsel also asked whether she was feeling the effects of the beer she had drunk; she said that it made her feel "relaxed" and "dizzy" and unable to "pay that much attention to what was going on[.]" Thus, building on E.C.'s direct-examination testimony, counsel elicited evidence to support an array of arguments that her purported admissions, even if made, were unreliable.

Defendant asserts that the *Crawford* test was not satisfied because he did not have the opportunity to cross-examine E.C. *as*

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[14] Defendant went through four attorneys below, and also represented himself for a substantial period before trial.

to Deputy Warren's statement that she had told defendant she was 16, since she claimed she did not remember saying that and Warren had not yet testified. But *Crawford* does not hold that testimonial hearsay may be admitted only if the defendant covered every conceivable point when cross-examining the witness in a prior proceeding: *Crawford* holds that the opportunity to cross-examine is sufficient.

Because a *Crawford* objection to the admission of E.C.'s statement to Deputy Warren would have been futile, trial counsel was not ineffective for not raising it. (*People v. Majors, supra*, 18 Cal.4th at p. 403.)

Evidence Code section 1291

Evidence Code section 1291 provides in part:

"(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

"(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

"(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

"The recent decision of *Crawford*[*, supra*], although changing the law of confrontation in some respects, left these principles intact." (*People v. Seijas* (2005) 36 Cal.4th 291, 303.) Thus, the admissibility of E.C.'s preliminary hearing testimony depends not only on *Crawford*, but also on Evidence Code section 1291. Defendant claims that it was inadmissible under this provision. He is wrong.

Defendant asserts that he did not have "an interest and motive" to cross-examine E.C. at the preliminary hearing "similar to that" which he would have had at trial (Evid. Code, § 1291, subd. (a)(2)), because (1) Deputy Warren had not yet testified to E.C.'s admission that she had told defendant she was 16, and (2) E.C. had not yet revealed that she would not testify at trial. Not so.

Defendant's interest and motive at the preliminary hearing in cross-examining E.C. was the same as it would have been had she testified at trial: to attack the credibility of her prior inconsistent statement to Deputy Warren. Defendant's counsel at the preliminary hearing did so, with E.C.'s help, by planting the seeds for all of defendant's subsequent arguments on these lines. The fact that Warren had not yet testified at the preliminary hearing is insignificant, since defendant already knew through discovery what Warren would testify to. Whether defendant knew that E.C. would refuse to testify at trial likewise makes no difference to this analysis.

Because Evidence Code section 1291 did not bar E.C.'s preliminary hearing testimony, trial counsel was not ineffective for failing to raise a futile objection on that ground. (*People v. Majors, supra*, 18 Cal.4th at p. 403.)

Coercion

Defendant asserts that the trial court's ruling on this issue was erroneous. We disagree.

A defendant has standing to assert that the prosecution violated his due process right to a fair trial by using a coerced third-party statement against him. (*People v. Jenkins* (2000) 22 Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 344, 347-348; *People v. Lee* (2002) 95 Cal.App.4th 772, 781.) The defendant bears the burden of proving that the statement was involuntarily obtained. (*People v. Douglas* (1990) 50 Cal.3d 468, 500.)

Where the evidence surrounding the alleged coercion conflicts, we must accept the version most favorable to the People, to the extent supported by the record; however, if the facts are not in dispute, we review the record de novo to determine, based on the totality of circumstances, whether the statement was voluntary. (*People v. Badgett, supra*, 10 Cal.4th at pp. 352-354; *People v. Anderson* (1990) 52 Cal.3d 453, 470; *People v. Lee, supra*, 95 Cal.App.4th at p. 781.) We consider both the characteristics of the witness and the details of the encounter. (See *People v. Neal* (2003) 31 Cal.4th 63, 80.)

Defendant begins with a footnote insinuating that Deputy Warren fabricated E.C.'s statement and that his "general veracity," which trial counsel attacked, is in question. Appellate arguments require headings or subheadings and may not be raised in footnotes. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We therefore disregard this point.

Conceding Warren's credibility for argument's sake, however, defendant asserts that E.C.'s statement was involuntary because: (1) She was 16 years old. (2) "She had been embarrassed by being interrupted during sexual intercourse, and had been approached by officers while nude from the waist down." (3) Warren waited only until she put her pants back on, then immediately questioned her as to her age, then, "upon finding her answer unsatisfactory, had taken her aside and questioned her again[.]" (4) He then patted her down, handcuffed her "and put her in the back of his caged squad car . . . all in public, though the experience would have been plenty frightening and humiliating in private, as well[.]" (5) He drove her to the station in handcuffs and removed her from his patrol car still in handcuffs. (6) He interrogated her "*not* in a room designed for interrogations, which again would have been plenty daunting, but instead in the evidence room[.]" (7) Although he admitted in court that she was not free to leave, he did not give her *Miranda* advisements or any others as to her rights, did not contact her parents, and did not offer to let her do so -- "a fairly thorough evisceration of her rights, and a pellucid

indication of the bad faith in which he acted on the night in question[.]" (8) "*The most important factor of all*: Although the minor summoned the courage, or desperation, to tell Warren 'two or three times' during the interrogation that she needed to use a restroom, he ignored those requests/entreaties and told her that she must not urinate because she was going to take a medical examination -- even though it was up to her, not him, whether she took that examination[.]" (9) As soon as she escaped from him, she told his partner that she would not take the examination.[15] We are not persuaded.

First, "[t]he bulk of the legal authority relied on by [defendant] is the opinion of [his] counsel, an opinion often unsupported by citation to any recognized legal authority."

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[15] Appellate counsel's briefing style, on this issue and others, has not made his arguments easy to address. In this instance, he recaps points already made under another heading, but does not repeat the record citations he provided earlier. This court has refused to consider arguments made on the basis of alleged facts not supported by citation to the record, even if the party's brief gives record citations for those facts elsewhere. "[*A*]*ny* reference in the brief must be supported by a citation, regardless of where in the brief that reference appears. This is consistent with former rule 15 [of the California Rules of Court], which required a record citation for '[t]he statement of *any* matter in the record.' (Italics added.) Moreover, it is the only construction consistent with the purpose of the citation requirement, which is to enable appellate justices and staff attorneys to locate relevant portions of the record expeditiously without thumbing through and rereading earlier portions of a brief." (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16.) In this instance, however, we shall exercise our discretion to consider appellant's points even though improperly made without record citation.

(*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Defendant cites only his counsel's opinion for the proposition that any or all of the above circumstances point to coercion. Although "totality of the circumstances" review is necessarily fact-based, defendant asserts at least one proposition which requires authority: that Deputy Warren had, and should have realized that he had, a legal obligation to advise E.C. pursuant to *Miranda* (or its juvenile-law statutory counterpart, Welfare and Institutions Code section 625), even though he considered her a victim undergoing an investigative detention, not a crime suspect under arrest. Defendant's failure to cite authority forfeits this claim. (*Kim v. Sumitomo Bank*, *supra*, 17 Cal.App.4th at p. 979.)

Second, defendant's vivid rhetoric depends almost entirely on speculation. Defendant surmises that E.C.'s supposed embarrassment, fright, and humiliation overbore her will, but cites no evidence before the trial court at the section 402 hearing that she felt these emotions during the interview. He also ignores both Deputy Warren's contrary testimony and the trial court's assessment of E.C.'s willpower based on direct observation.[16]

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[16] If we were to accept defendant's invitation to speculate on these lines, we might speculate that a 16-year-old who had just engaged in public sex for two hours was, if anything, less prone to embarrassment, fright, and humiliation than the average 16-year-old.

Third, as to what defendant calls "[*t*]*he most important factor of all*," E.C.'s requests to use the bathroom, defendant simply indulges in more speculation. He cites no evidence and ignores Warren's testimony that E.C. showed no sign of an urgent need to urinate. Instead, defendant discourses on the diuretic properties of beer. However, absent evidence that it had this effect on E.C., for us to conclude that it did would be ultracrepidarian. Defendant also fails to show why we should not accept Warren's explanation (as the trial court impliedly did) that it is standard and appropriate departmental policy to refuse bathroom visits to persons awaiting evidentiary examinations in sex-crime cases, in order to preserve evidence.

Fourth, as already noted (see fn. 15, *ante*), no evidence supports defendant's assertion that as soon as E.C. had gotten away from Deputy Warren she told his partner that she would refuse the evidentiary examination. But even if the evidence showed that she said this then rather than later, this fact would not tend to show that her statement to Warren was involuntary.

Having reviewed the record independently, we agree with the trial court that E.C.'s statement to Deputy Warren was voluntary. Thus its substance was properly admitted through Warren's testimony.

III

Defendant contends that the trial court erred by denying his pro se *Pitchess* motion. We disagree.

Background

While representing himself before trial, defendant filed many motions. Some asserted that the authorities, particularly law enforcement in the Citrus Heights area, had a longstanding vendetta against him because he was a Black man who had tried to better himself.[17]

In a *Pitchess* motion filed on October 19, 2004, which attached two declarations and a memorandum of points and authorities, defendant sought discovery of the personnel records of Deputy Warren, Deputy Paredes, Detective Linke, and other officers. The first declaration stated that defendant believed this discovery would reveal evidence of the officers' racial and ethnic prejudice and related official misconduct, based on the racial profiling and abusive treatment to which he had long been subjected and had repeatedly filed complaints about. The second declaration stated that, based in part on the arresting officers' lack of diligence in seeking eyewitnesses to the purported crimes, defendant believed the officers had used the present incident to retaliate against him for filing complaints.[18] To the memorandum of points and authorities, he

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[17] Appellate counsel cites these pleadings to support his argument that defendant suffered from a mental disability which mitigated his guilt and should have moved the trial court to strike one or both of his strikes. (See part IV of the Discussion.)

[18] In connection with a separately filed pro se motion for funds to hire an expert on eyewitness identification testimony,

attached a statement headed "Re: Deputy Warren's Political Viewpoint," which alleged that E.C.'s mother "recently stated to a mutual aquaintance [*sic*] that [D]eputy Warren, in a conversation with [E.C.'s mother or father], has stated that he . . . is an avowed White Supremacist."[19]

At a pretrial hearing on defendant's pro se motions, the trial court observed that identity did not appear to be an issue in the case. The court reserved the *Pitchess* motion for the following week, when Sheriff's Department representatives could attend.

The Sheriff's Department filed opposition to the motion, asserting among other things that defendant had not shown good cause for discovery because he had not laid a plausible factual foundation to show that police misconduct could have anything to do with this case.

At the hearing on the motion, the trial court noted that it had read everything defendant filed in support of his motion, then ruled: "I agree with the papers filed by the Sheriff's Department. . . . I don't think you established sufficient

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defendant asserted in court that the officers did not interview the residents until two months after the incident (during which they had been over 300 yards away).

[19] So far as defendant's appellate briefing shows, these pleadings do not mention Deputy Warren's April 2004 preliminary hearing testimony. Appellate counsel notes, however, that Warren testified that when he arrived at the crime scene, he saw defendant's "naked black buttocks."

grounds where I have to order in camera review, so I will deny your motion."

Analysis

Defendant asserts that the trial court's "summary" denial of his motion was error. We are not persuaded.

To show good cause for *Pitchess* discovery, a defendant must submit a declaration which establishes the materiality of the requested evidence by (1) proposing a defense or defenses to the charges, (2) articulating how the discovery sought may be admissible and relevant evidence or may lead to such evidence, (3) describing a plausible and factually specific scenario supporting the claim of officer misconduct, and (4) showing a logical connection between the claimed misconduct and the proposed defense or defenses. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024-1027.) Defendant's argument fails at the threshold because he does not cite or discuss the *Warrick* standard, nor make any showing that his motion met that standard.

Defendant had two possible defenses: to deny that he did the alleged acts, or to admit them but to claim the legal excuse that he reasonably believed E.C. was 18. He cites nothing in the record to explain how his motion and supporting declarations spelled out either defense or explained how the alleged police misconduct could be logically connected to either. Instead, he spends five pages of his opening brief ruminating about whether, as he alleged, Deputy Warren *might* be a racist and *might* have

confided his views to E.C.'s parents. The question defendant does not attempt to answer is: even if all that were true, how could it matter? Since at least four eyewitnesses saw defendant engaging in the charged conduct long before Warren arrived, defendant could not seriously have asked the jury to find that Warren invented the charges or framed defendant for someone else's acts. Nor was Warren's alleged racism relevant to whether defendant reasonably believed in good faith that E.C. was 18.

Defendant has shown no grounds for reversal on this issue.

IV

After the verdict, defendant's latest counsel filed a request that the trial court exercise its sentencing discretion under section 1385 and *Romero, supra*, 13 Cal.4th 497, to strike one or both of defendant's strikes. The trial court ultimately denied the request. Defendant contends this ruling was an abuse of discretion. We disagree.

Defendant's request

Counsel argued: (1) The strikes were remote in time (1986), occurred in a short period when defendant was around 20 years old, and arose out of a single episode involving a breakup with a girlfriend; before he committed the second offense, probation had been recommended for the first. (2) Aside from alcohol-related misdemeanors, he had committed no further offenses. (3) The present offenses did not involve force or the threat of force. (4) During and after his incarceration,

defendant obtained education and vocational skills, then held down a variety of jobs. (5) Two mental health experts appointed by the court agreed that defendant suffered from emotional disorders, but was not likely to reoffend.

The motion attached defendant's resume and the reports of psychiatrist Charles Schaffer and psychologist Janice Nakagawa.[20]

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[20] Defendant's resume showed that he had earned 49 units at Sierra College as of June 2003 and had acquired certifications in computer networking from technical institutes; he had also held a number of positions in computer networking and support from 1999 through 2003, of which the longest had lasted for 20 months and most had been short-term.

Dr. Schaffer's evaluation concludes: Defendant has a psychiatric disorder characterized by paranoid ideation, with possible diagnoses including bipolar disorder, delusional disorder, or psychotic disorder not otherwise specified (NOS); he probably also suffers from alcohol abuse disorder and personality disorder NOS. There was insufficient evidence that he was suffering from any physical or mental condition which significantly reduced his culpability for the present crimes. He admitted to "bad judgment" in relation to those crimes, but also blamed his arrest and conviction on a pattern of harassment by Citrus Heights law enforcement. There was insufficient evidence that he was at risk to repeat sexual activities with minor females in the future or that he would require psychiatric treatment to prevent such conduct. He might benefit from treatment for his psychiatric disorder and alcohol abuse, but his failure to seek treatment in the past bodes poorly for his prognosis.

Dr. Nakagawa's evaluation concludes: Defendant has an immature personal style with aspects of chronic inadequacy and clear antisocial dynamics, but does not suffer from any major mental disorder such as hallucinations, delusions, or paranoid ideation. He did not suffer from any physical or mental condition that significantly reduces his culpability for the present crimes. He admitted to poor judgment in the present crimes, but did not appear to understand the injury done to the

The People's opposition

The People opposed defendant's request. They described defendant's two strikes and his underlying conduct as follows:

1. On New Year's Day, 1986, after having kidnapped his ex-girlfriend and forced her to stay outside with him all night long, he returned to her home, tried to kidnap her again, held a knife to her throat, dragged her into the parking lot, knocked her down, and attacked an onlooker who had been trying to stop him from driving away with her, repeatedly stabbing the victim in the back while saying, "I love to kill white boys." Defendant pled guilty to violating sections 207 (kidnapping) and 245, subdivision (a)(1) (assault with a deadly weapon, causing great bodily injury).

2. On July 11, 1986, while awaiting sentencing on the prior charges, defendant went to his ex-girlfriend's workplace, raped her, and kidnapped her again. Defendant pled guilty to kidnapping. At that time he was sentenced to a total state prison term of six years for all the offenses together.

The People also noted that defendant's post-incarceration record included violations of Vehicle Code section 23152, subdivisions (a) and (b), in 1991 and 1996.

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victim; he also did not acknowledge the way in which he had used alcohol to facilitate the sexual encounter. There was no evidence that he presents an undue danger to society at this time or that he is likely to commit similar crimes in the future. Although he is not psychologically minded or inclined to examine his motivations, he might benefit from alcohol treatment and behavioral counseling.

The People argued that defendant's priors, though old, were extremely violent; he had not led a blameless life since his release from prison; there was no evidence that he had a stable living situation or a history of lawful employment for any significant period of time; and he had "no prospects for the future except more criminal activity[.]"

The hearing on the motion and the trial court's ruling

The trial court's initial remarks

Before hearing argument, the trial court set out its "introductory thoughts" as follows:

Defendant's priors, though old, were "very serious"; however, the current offense was nonviolent and "largely" consensual. Under *Romero* and *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the court could strike one or more strikes only if it found that defendant was outside the spirit of the Three Strikes law. The "checklist" of *Romero* and *Williams* factors (*Williams, supra,* 17 Cal.4th at p. 161) contained items that pointed both ways.

As to the remoteness of the priors, they occurred 18 years ago and defendant was discharged from parole 11 years ago.

As to intervening conduct, defendant had sustained convictions for driving under the influence, but not for crimes of violence. He also had an outstanding arrest warrant in Santa Clara County at the time of the present crimes.

As to the nature of the priors, their life-threatening violence was very troubling. So was the fact that defendant

still minimized their seriousness when talking to the court-appointed experts.

As to whether they constituted a single act or a single instance of aberrant behavior, they did not arise out of the same act or transaction, but they occurred in a comparatively short time and involved the same victim.

As to the length of defendant's record, defendant did not appear to be the sort of "revolving-door criminal" described in many Three Strikes cases.

As to defendant's age, the fact that he was of mature years did not count in his favor if he had not "added any maturity with his age."

As to the nature of the present offense, though consensual and nonviolent, it involved "a 40-year-old man having sex with a 16-year-old girl after he has given her alcohol." He had previously had a confrontation with the girl's father, who had told him to stay away from her. The outstanding Santa Clara County warrant, on which he had failed to appear, charged him with drinking in a park or public place. He had been arrested in Sacramento County on the warrant and had spent the night in jail. Immediately on release, he obtained beer and a sleeping bag and went to meet the minor in a park or public place.

As to rehabilitation, defendant had obtained education and vocational training, he was above average in intelligence, and both experts had found him unlikely to repeat sexual offenses with minors. On the other hand, the longest he had held a job

was "about three and a half or four years,"[21] and at the time of the present crimes he was "a 40-year-old man living unemployed with his parents."

As to the experts' reports, they showed that defendant did not feel fully culpable for his past acts and seemed to see himself as the victim. He had not exhibited contrition or cooperated in the investigation of the present crimes. On the contrary, he denied to the experts that he and the minor had sex and accused the civilian eyewitnesses of lying out of dislike for strangers in the neighborhood. He also accused the officer of lying and the minor's father of racism.

Defense counsel's argument

In addition to the points already raised, counsel asserted:

Defendant had always been trouble-free in custody.

When defendant pled to his prior felonies, they were treated as a single case. As to the first strike, the probation report noted that defendant may not have caused the injury to his ex-girlfriend and may have felt that he was acting in self-defense; as to the second strike, the original rape charge was dismissed. If the Three Strikes law had existed then, his counsel probably could have plea-bargained around it, especially since defendant was a first-time offender.

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[21] The court apparently misspoke on this point. The longest job tenure shown on defendant's resume is 20 months.

Defendant's current offense would not even be a crime in many states. And so far as the law is meant to protect minors from themselves, the minor in this case, judging by her prior testimony and her courtroom demeanor, did not need such protection.

Defendant has strong family support. He and his mother speak almost every day, and his brother had come to court on his behalf.

Not only did the experts say that defendant was unlikely to reoffend and could benefit from counseling, but defendant had established a rapport with Dr. Schaffer and would like to continue seeing him. This would give the court a way of monitoring his progress and keeping him in line.

The court's further observations

The court took issue with counsel's remarks about the present crime. This was not a case of a 19-year-old having sex with a 16-year-old: "This is a 40-year-old man who gets out of jail the night before for drinking in the park or arrested on a warrant outstanding for drinking in a park, gets a six-pack and a sleeping bag and takes the 16-year-old to this wooded area." Furthermore, that the minor had a strong will did not show that she had mature judgment.

The court also stated: "If I were writing on a blank slate, your arguments would be much more compelling. But I'm dealing with the law that the voters and the Legislature have given me. I'm looking for the extraordinary factor, the

extraordinary circumstances that take[] us out of the three strikes scheme. To argue that a three strikes sentence is draconian is to state -- that's the point of three strikes."

The court remained troubled, however, by the fact that defendant did not fit the usual "revolving door" profile of Three Strikes offenders.

The prosecutor's argument

The prosecutor conceded that this was "a difficult case," but asserted that defendant's history and current offense did not take him outside the spirit of Three Strikes. Among other things, in connection with the second strike he had raped the victim twice, although "good lawyering skills" got the charges dropped.[22]

As to defendant's history and character since his release, his pro se pleadings alleged that the police were always contacting him, which does not happen to "[n]ormal people" but only to "[p]eople who create problems." At times he had been "semi homeless" and had the habit of drinking in parks. Even when he was working, he "has an almost impossible time keeping a job"; he had had around 20 jobs, "and it's always somebody

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[22] Defense counsel objected, asserting that the court could not consider the alleged rape because that charge was dismissed without a *Harvey* waiver. The prosecutor replied that the court could consider all the facts of the prior case. The court replied to both counsel: "All right. So noted."

Defendant asserts that the court's noncommittal response means that it must have improperly considered the dismissed charge. As we explain further, this assertion is groundless.

else's fault he lost it." He believed that he had never done much wrong, yet the whole world was out to get him. He accepted no responsibility for his acts. All this showed that he lacks good character. These facts, combined with the exploitative nature of the present crimes and his failure to recognize how he had damaged the victim, showed that his prospects were poor.

As to the experts' reports, both "severely understate any mental conditions [defendant] has. [¶] I mean, you can read the hundreds of pages of pro per papers, and it doesn't take a genius to figure out something is very wrong with [defendant] psychologically. He believes that the Government has gone into his house and taken his computer and replaced it with an exact replacement with the exact same information on it for purposes of monitoring his conduct and behavior. He believes multiple telephone companies have conspired with the Government to tap his phones and to interrupt his telephone calls. [¶] He believes that the Government has sent to him what he calls, and I quote, intimate informants. Those people the Government sends to him to gain his trust and confidence and have sexual intercourse with him, so he, in turn, opens up to them, and they go back to the Government and inform on him." Because the experts minimized defendant's disturbance, their predictions that he was unlikely to reoffend could not be relied on.

Defense counsel's rebuttal

Counsel replied:

Unlike the prosecutor, the court-appointed evaluators were experts and their opinions deserved credence.

There was no evidence that defendant realized he was a third-striker when he committed the present crimes; in his mind, he had been convicted of one case and sent to prison on concurrent sentences. As to that case, the allegation that he talked about killing white boys was never tested in court, and defendant denied it. The probation department, not defendant, suggested that he might have thought he was acting in self-defense. There was no rape conviction because there was no rape.

As to defendant's later history and character, he often changed jobs because short-term contract positions were the norm in his field. It was not surprising that the police might often contact a Black person living in certain neighborhoods, and this did not show defendant to be a revolving-door offender. If there were concerns about his mental state, that was all the more reason to treat him rather than to "warehouse" him in prison for life.

Defendant's remarks

Defendant addressed the court, saying that he was close to finishing his associate of arts degree, had already graduated from Heald Technical College, and intended to reenter the high-tech field after further "refresher" training.

The court's ruling

The court ruled as follows:

"I am not going to exercise my discretion to strike the strike. I don't come to this decision lightly. I've given it a lot of thought. And were I to decide what I thought was the appropriate punishment for [defendant]'s current conduct, it might be different, but I'm not writing on a blank slate.

"The Court of Appeal in the McGlothin case[,] 67 Cal.App.4th 468, [h]as characterized . . . the Romero motion in the dismissing of a strike in the interest of justice as, quote, an extraordinary exercise of discretion, closed quote, similar to set[ting] asid[e] a judgment after conviction.

"And, in my mind, the most compelling factor[] in my analysis is of the seriousness of the prior conviction. Weighing on the other side of that argument for striking the strike would be the prolonged period of time without a serious or a violent offense, but we have then this current offense, which . . . I think is more serious than the defense has argued, and I'm particularly troubled by the [d]efendant's denial of any culpability in the current event and also his minimizing the prior event.

"Again, he denies that there was any criminal conduct in this instance. The four residents across the street are lying. The officer who came upon him in the act -- literally -- was lying. And that the victim's father opposed their relationship because the victim's father was motivated by race rather than concern that his daughter was being involved with a 40-year-old man. It just strikes me that that's further evidence of what

the doctors have viewed as an antisocial personality that just minimizes his conduct.

"And so for those reasons I do not find extraordinary circumstances that, I think, I'm required to find to take the [d]efendant outside of the three strikes scheme. That doesn't mean I'm comfortable with my decision by any means. But I am guided by the court's language in McGlothin. In fact, I'm just going to read it from 67 Cal.App.4th 468 at 476.

"The Third DCA, our Court of Appeal[23], says ['']in a democracy, the scope of a judge's authority is encompassed by the judgment of the citizens who bestow on the judiciary its authority in the first instance. Under our statutory framework, judges are not empowered to fashion any sentence they choose. The Legislature has created a sentencing structure within which every court must operate.

"['']Both the Legislature and the People, by initiative, have adopted a particular sentencing scheme for repeat offenders. A Court may not simply substitute its own opinion of what would be a better policy, or a more appropriately calibrated system of punishment, in place of that articulated by the People from whom the court's authority flows.['] Close quote.

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23 As defendant points out, *People v. McGlothin* (1998) 67 Cal.App.4th 468, was actually decided by Division Three of the First District Court of Appeal.

"And, Mr. Bowman, I think that's really what you're asking, do I think it's appropriate[] to warehouse [defendant] by what you call a death sentence for this current offense is not really the choice before me. The voters and the Legislature have laid out sentencing schemes.

"And unless I find some very extraordinary circumstances that take [defendant] outside of that sentencing scheme, under the law, he faces the sentencing impos[ition] of that scheme. And I just don't find extraordinary circumstance[s] that I think would justify the exceptional relief of granting of [the striking of] a strike in this case.

"So for those reasons I'm denying the request that I exercise my discretion to strike either of the two strikes in this case."

Analysis

Our Supreme Court has recently clarified the standard of review for a claim that the trial court abused its discretion under section 1385 by refusing to strike a strike. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-380 (*Carmony*).)[24] As will appear, defendant cannot show an abuse of discretion under the *Carmony* standard.

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[24] Both defendant's opening brief and the People's brief ignore this controlling decision. Defendant cites it in his reply brief, but quotes only a single sentence, as noted below.

Carmony

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376-377.)

"Because 'all discretionary authority is contextual' [citation], we cannot determine whether a trial court has acted irrationally or arbitrarily in refusing to strike a prior conviction allegation without considering the legal principles and policies that should have guided the court's actions. We therefore begin by examining the three strikes law." (*Carmony, supra*, 33 Cal.4th at p. 377.)

"'[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict

courts' discretion in sentencing repeat offenders.' [Citation.] To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.]" (*Carmony, supra,* 33 Cal.4th at p. 377.)

"Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "'in furtherance of justice'" pursuant to [] section 1385[], or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.'" (*Williams, supra,* 17 Cal.4th at p. 161.)" (*Carmony, supra,* 33 Cal.4th at p. 377.)

"Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.)

"*In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss* [*citation*]*, or where the court considered impermissible factors in declining to dismiss* [*citation*]*. Moreover, 'the sentencing norms* [*established by the Three Strikes law may, as a matter of law,' produce*[] *an "'arbitrary, capricious or patently absurd'" result' under the specific facts of a particular case.* [*Citation.*]" (*Carmony, supra,* 33 Cal.4th at p. 378; italics added.)

"But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation], or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the

circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.[25] Of course, in such an extraordinary case -- where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds would differ -- the failure to strike would constitute an abuse of discretion." (*Carmony, supra*, 33 Cal.4th at p. 378.)

Application

The trial court showed at the start that it understood its discretion under Three Strikes by reciting the "checklist" of factors from *Williams, supra*, 17 Cal.4th 148, in which our Supreme Court defined the scope of a trial court's discretion to strike a strike, and observing that these factors pointed both ways in defendant's case. The court also noted correctly that even if defendant is not the "revolving door" career criminal typically encountered in Three Strikes cases, this does not take

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25 Defendant's reply brief quotes this sentence from *Carmony* out of context, in support of his argument that he falls outside the spirit of the Three Strikes law because he is not a "career criminal." We reject this argument below.

him outside the law's reach: anyone with at least one strike is presumed to fall within the spirit of the law unless he shows otherwise. (*Carmony, supra,* 33 Cal.4th at p. 377.) During its colloquy with counsel, the court continued to balance the *Williams* factors, weighing the gravity of defendant's prior offenses and his present offense against his relatively crime-free interim history and his efforts at self-improvement. Finally, the court made clear that it was not merely defendant's crimes but his self-perception as a blameless victim and his utter failure to admit to or take responsibility for his acts, indicating that his character and prospects for future change were poor, which decisively brought him within the spirit of Three Strikes. This reasoning process was an exemplary exercise of discretion.

Defendant asserts to the contrary that the trial court abused its discretion by basing its decision on legal and factual errors. He claims that the court erred legally by (1) improperly considering the dismissed 1986 rape charge, (2) relying on an "'extraordinariness' standard" applicable only to career criminals, and (3) overlooking a relevant mitigating factor, defendant's mental disturbance. He further claims that the court erred factually by (1) mischaracterizing the present offenses, (2) mischaracterizing defendant's work history, (3) failing to grasp the meaning of Dr. Schaffer's report, and (4) declaring without expertise or factual foundation that

defendant exhibits "antisocial personality disorder." We are not persuaded.

"Legal errors"

Defendant's only "evidence" that the trial court considered the dismissed rape charge is that the court at the outset called the prior strikes "two very serious convictions as detailed extensively in the People's opposition" (which, as discussed above, mentioned the alleged rape), then noncommittally "noted" counsels' arguments about it -- including defense counsel's vehement assertion that it could not be considered. Defendant does not cite any statement by the court affirmatively showing that it considered this charge. Instead, he merely asserts that it is "manifest" the court did so. Defendant's argument is groundless.[26]

Defendant's claim that the court wrongly used an "'extraordinariness' standard" is a quibble. He notes that this court applied an "extraordinary circumstances" test to decide whether a career criminal fell outside the spirit of the Three Strikes law. (*People v. Strong* (2001) 87 Cal.App.4th 328, 332 (*Strong*), quoted in *Carmony, supra*, 33 Cal.4th at p. 378.) He then concludes that because he is not a career criminal, the court's use of this language shows it misapprehended the

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[26] So far as defendant claims that his second prior offense could not properly be called "very serious" if it were merely a kidnapping and not also a rape, he cites no authority for this proposition and we know of none.

standard applicable to him. His conclusion is unsupported. First, *Strong* and *Carmony* had no occasion to consider whether the "extraordinary circumstances" test would apply to persons other than career criminals, because the issue was not presented in either case. (*Carmony, supra*, 33 Cal.4th at pp. 378-380; *Strong, supra,* 87 Cal.App.4th at pp. 331, 338-340; cf. *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Second, to say that only "extraordinary circumstances" justify striking a strike amounts to the same thing as to say that a three-strike defendant is presumed to fall within the spirit of the law: where that presumption exists, refusing to strike a strike is the ordinary result, and striking one or more is the extraordinary result. The trial court's careful balancing of the *Williams* factors showed that it understood the test applicable to defendant.

Defendant's claim that the court failed to consider his mental illness as a mitigating factor depends on a misunderstanding of the applicable law. He cites rule 4.423(b)(2) of the California Rules of Court, which allows a trial court to consider as a "circumstance in mitigation" that "[t]he defendant was suffering from a mental or physical condition *that significantly reduced culpability for the crime*[.]" (Italics added.) However, he does not explain how his mental condition reduced his culpability for the present

crimes.[27] He also does not cite any authority holding that this factor, even if found to exist at the present time, suffices to take a defendant outside the spirit of Three Strikes. The court was well aware of defendant's mental problems, having read the experts' reports and heard counsels' arguments about them. The court simply did not find that these problems justified striking a strike.

"Factual errors"

Defendant's claim that the court mischaracterized his present offenses is not well taken. He objects to the court's statement that he "ha[d] sex with a 16-year-old juvenile after he ha[d] given her alcohol," pointing out that the victim told Deputy Warren she had drunk only one beer. We are unable to grasp how the victim's statement, even if credible (at the preliminary hearing she claimed she had drunk three beers), renders the court's statement false. Defendant does not and cannot dispute that he brought beer to the greenbelt and gave it to the victim.

Defendant's claim that the court misstated his work history and present living circumstances is no more persuasive. He admits the facts found by the court -- that he had never held a

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[27] In any event, we do not see how paranoia (if that is the "mental condition" on which defendant relies) could reduce defendant's culpability for his conduct in this case: arranging to meet a minor in a public place, plying her with alcohol, and carrying on a variety of sexual acts with her under the eyes of a streetful of neighbors.

long term job, and that he was presently unemployed and living with his parents -- but claims that his lack of advanced degrees and his two-strike stigma mitigate those facts. The court's comment, whose factual accuracy defendant concedes, was part of a total assessment of defendant's history, circumstances, and prospects. Defendant has not shown that the court abused its discretion in making that assessment.

Defendant's claim that the court misread or misrepresented Dr. Schaffer's opinion amounts to much ado about nothing. Defendant asserts that the court "quoted only a very small portion of the primary conclusion" of Dr. Schaffer's report, namely that defendant has "a history of dysfunctional maladaptive behavior." Defendant then quotes Dr. Schaffer's findings of a "psychiatric disorder characterized by paranoid ideation" with "possible diagnoses" of "[b]ipolar [d]isorder," "[d]elusional [d]isorder," or "[p]sychotic [d]isorder, [n]ot [o]therwise [s]pecified," and additional possibilities of "[a]lcohol [a]buse [d]isorder" and "[p]ersonality [d]isorder, [n]ot [o]therwise [s]pecified." After discoursing on where these "possible" diagnoses fit on Axes I and II of DSM-IV, defendant concludes that because the court did not mention all of these findings, it failed to realize how gravely impaired Dr. Schaffer found defendant to be. However, even if the court had accepted all of Dr. Schaffer's diagnoses -- though Dr. Schaffer offered them only as "possible" -- the court was not required to conclude that they put defendant outside the spirit of Three

Strikes. If defendant's mental condition, whatever it might be, had already led him to commit at least three felonies, including two strikes, and was likely to cause him to commit more offenses in the future, then it put him squarely within the law's scope.

Finally, defendant's claim that the court improperly diagnosed him as suffering from "antisocial personality disorder" is unpersuasive for the same reasons as his previous claim. Whether or not the court used the term precisely as the experts or DSM-IV might use it, the court based its observation in part on defendant's adamant denial of culpability and insistence that all the witnesses against him were lying. Those facts, which defendant does not dispute, give weight to the court's finding that defendant's character and future prospects were poor. If defendant persists in believing or claiming to believe that everyone but himself is at fault for whatever he does, it is likely that he will continue to offend in the future if allowed to remain at large.

Defendant has failed to show any abuse of discretion in the trial court's sentence.

V

Defendant points out, and the People concede, that the sentencing minute order contains an error: although it correctly gives his total prison term as 25 years to life, it also incorrectly states: "The total term imposed is twenty-five (26) years to life." We shall remand the matter with directions that the trial court prepare a corrected minute order.

DISPOSITION

The matter is remanded to the trial court with directions to proceed in accordance with part V of this opinion. In all other respects, the judgment is affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

HULL, J.